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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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Honorable Gwendolyn E. Boyd
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Colleges and Universities – Joint Venture
Agreements – Private Enterprise – Grants –
Contracts

Alabama State University may enter into a profit-sharing agreement with a private entity to jointly bid on federal contracts or grants that provide educational programming beneficial to either the student body or the public.

Dear Dr. Boyd:

This opinion of the Attorney General is issued in response to your request.

QUESTIONS

(1) Can Alabama State University (“University”), as a public institution, enter into a joint venture with a private entity for profit?

(2) Can the University share monetary profits with a private entity based upon a joint venture agreement?

FACTS AND ANALYSIS

In your letter of request, you informed this Office that Alabama State University is considering entering into a joint venture with a private entity for

the purpose of bidding on and securing federal contracts, as contractors or subcontractors, and/or federal grants. You further stated that the University will not be required to advance any money to the private entity in pursuit of these federally-awarded contracts or grants, but the University may have to share a portion of the proceeds from the contracts with the private entity depending on the various contract requirements. The private entity has requested that the University execute an agreement before it participates in attempting to secure contract opportunities with the University.

In a subsequent conversation, you informed this Office that the private entity would identify contractual or grant opportunities that are closely aligned with or best complement the interests or focus of the University. The entity would seek the assistance of the University either as a result of a previous relationship that has developed within a particular educational discipline or as a result of the prominence of the University within the community.

You additionally informed this Office that two different types of collaborative agreements are contemplated. One such arrangement would involve the University's jointly bidding on nationwide governmental contracts that would require technical or specific expertise in a wide range of categories. These contracts may or may not have a connection to education or providing education to persons enrolled in the University or to members of a specific community or area. To the extent possible, such contracts would be fashioned in a manner to allow the use of students to perform services as part of an educational program, internship, college credit, or work study.

Alternatively, a different arrangement contemplates the University's ability to partner with a private entity to seek governmental contracts or grants that would focus on the University's ability to offer various educational programs to the community and the campus alike.

In either scenario, you emphasized that the University would not risk any monies, assets, or directly expend funds of the University. Further, the University and the private entity would share profits to the extent expressly agreed upon by these two entities.

The Board of Trustees for the University "are constituted a body corporate of the state." ALA. CODE § 16-50-21 (2012). The authority of the Board is extremely broad. Specifically, section 16-50-22 of the Code of Alabama states as follows:

Such corporation shall have all the rights, privileges and franchises necessary to the promotion

of the ends of its creation and shall be charged with all corresponding duties, liabilities and responsibilities. Such corporation may hold and may lease, sell or in any other manner not inconsistent with the object or terms of the grant or grants under which it holds dispose of any property, real or personal, or any estate or interest therein, remaining of any grant by any governmental unit or by any person, or accruing to the corporation from any source, as it may deem best for the purposes of the university.

ALA. CODE § 16-50-22 (2012) (emphasis added).

The University has the same autonomy as any other public university in the state, along with all the power conferred on, vested in, or required of the State Board of Education. ALA. CODE §§ 16-50-1 & 16-50-24 (2012). Section 16-50-22 generally gives the University the authority to enter into contracts, as long as such transactions are necessary to the promotion of the ends for which the University was created. *See, generally*, opinions to Honorable Laura V. Hall, Member, House of Representatives, dated July 22, 2010, A.G. No. 2010-084 (construing identical provision applicable to Alabama A & M University as granting the right to obtain a loan); Honorable Joe A. Lee, President, Alabama State University, dated April 3, 2007, A.G. No. 2007-064 (stating that the Board of Trustees has broad authority to do all things necessary to operate and manage the institution and promote the interests of the institution).

Section 93 of the Constitution of Alabama, as amended, prohibits the state from engaging in (1) works of internal improvement; (2) lending money or credit in aid of such; (3) being interested in any private or corporate enterprise; or (4) lending money or its credit to any individual, association or corporation. ALA. CONST. art. IV, § 93 (amend. 58). Section 94, as amended by Amendment 558 of the Constitution of Alabama, prohibits a county, municipality, or other subdivision of the state from granting money or other thing of value in aid of a private person, association, or corporation. ALA. CONST. art. IV, § 94 (amend. 558). Consistently, this Office has determined that these prohibitions are inapplicable to contractual agreements that have mutual benefits to both parties and consideration on both sides. *E.g.*, opinions to Honorable M. Barnett Lawley, Commissioner, Department of Conservation and Natural Resources, dated April 20, 2005, A.G. No. 2005-116; Honorable John I. Cottle, III, Attorney, Tallassee City Board of Education, dated November 10, 2004, A.G. No. 2005-017.

This inquiry is most analogous to the *Cottle* opinion in which this Office determined that a city board of education is authorized to enter into a joint venture with a private entity without running afoul of section 94. In that opinion, the Tallassee City Board of Education questioned whether it could enter into a joint commercial venture with TerraSouth to create and maintain a potentially profitable internet advertising website. In determining that the agreement passed constitutional muster, this Office reasoned as follows:

In an opinion to Manley L. Cummins, III, City Attorney of Daphne, dated December 13, 1995, A.G. No. 96-00065, this Office opined that the restrictions of section 94 of the Constitution of Alabama, as amended by Amendment 112, are “not applicable to a contract with mutual benefits to each party and a consideration on both sides,” *citing Rogers v. City of Mobile*, 277 Ala[.] 261, 169 So.2d 282 (1964); *Dothan Area Chamber of Commerce v. Shealy*, 561 So.2d 515 (Ala. 1990). . . . ***According to the facts in this case, the proposed commercial venture provides mutual benefits to both parties and a consideration on both sides.*** The school stands to receive revenue and hopes that the students will gain experience in interacting with community businesses, as well as experience with computers and web design. Graduates of the school may receive scholarships. TerraSouth also stands to receive revenues, as well as the sponsorship of a possible scholarship fund for graduates of Tallassee High School.

The Alabama Supreme Court has determined that the granting of an exclusive contract or a franchise, which does not comply with the Competitive Bid Law, constitutes an exclusive grant of special privileges in violation of section 22 of the Constitution. Although the Board, in this fact situation, is not “expending funds,” the Supreme Court has held that the Competitive Bid Law applies in similar cases. The Supreme Court further stated that the application of the Competitive Bid Law could not be avoided where there was no “expenditure of funds” because the services in question were not paid for by the city. Accordingly, if the contract grants an exclusive franchise, the project

Honorable Gwendolyn E. Boyd
Page 5

must be competitively bid under section 41-16-50 of
the Code of Alabama.

Id. at 2-3 (emphasis added).

Based on the information provided, both the University and the private entity will realize certain benefits as a result of either of the proposed agreements. The University will receive revenues and has the opportunity to further advance its educational goals for its students, as well as members of the public. The private entity will receive revenues and have the opportunity to partner with a nationally recognized institution in an effort to promote its particular interests. This Office cautions that the collaborative agreement would be subject to the Competitive Bid Law in order to avoid a violation of Section 22 of the Recompiled Constitution of Alabama.

CONCLUSION

Alabama State University may enter into a profit-sharing agreement with a private entity to jointly bid on federal contracts or grants that provide educational programming beneficial to either the student body or the public.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Monet Gaines of my staff.

Sincerely,

LUTHER STRANGE
Attorney General
By:



G. WARD BEESON, III
Chief, Opinions Section

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